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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **KENNETH ALLEN ROGERS,** **Defendant and Appellant.**	**A128650** **(Mendocino County Super. Ct. No. SCTMCRCR0565933)**

Appellant Kenneth Allen Rogers was sentenced to prison for a term of 25 years to life after a jury convicted him of conspiracy to commit murder and attempted murder with premeditation. (Pen. Code, §§ 182, subd. (a)(1), 187, 189, 664.)[1] He argues that the judgment must be reversed because (1) he was not brought to trial within the time required by section 1382 and the federal Constitution; (2) the trial court erroneously rejected a plea agreement that would have allowed him to plead guilty to a single count of accessory under section 32 and receive probation rather than a prison sentence; (3) he was deprived of the counsel of his choice when his retained attorney was removed due to a conflict of interest; and (4) his court-appointed attorney, who represented him at trial, provided ineffective assistance of counsel. We affirm.

FACTS

Appellant was the chairperson of the Westport County Water Board and the assistant chief of the Westport Volunteer Fire Department. He was active in the local

[1] Further statutory references are to the Penal Code unless otherwise indicated.

Republican Party and believed he had a future in Sacramento. Alan Simon, the victim in this case, moved to Westport in 2002.

Appellant was not universally popular in local politics. In 2004, a petition circulated to recall him from the water board. Simon signed the petition and became the only candidate to run against appellant. Appellant visited Simon at his house and asked him to remove his name from the recall petition, but Simon refused. In an election held August 31, 2004, appellant was recalled from office on a vote of 29 to 19, and Simon replaced him.

In December 2004, appellant called Simon and said that if he did not put 50,000 gallons of water in the water storage tank by the next morning, appellant "was going to hang" him. Knowing that appellant was angry about losing the recall election, Simon construed this as a serious threat on his life and reported it to law enforcement.

On January 19, 2005, the water board, led by Simon, voted to replace the chief of the volunteer fire department and appellant, the assistant chief. Appellant said this was a "terrible day for Westport" and filed a lawsuit challenging his termination.

In March 2005, Richard Peacock was released from prison. Appellant knew Peacock and gave him a job at his auto detailing business in Sacramento. Peacock told his parole officer that he "loved" appellant because of their friendship and "would do anything for him."

By May of 2005, Simon had decided to move from Westport and put his home up for sale. Also in May 2005, appellant told a woman who was notarizing loan documents for him that he felt incensed and persecuted over his removal from the water board and fire department.

On June 17, 2005, Richard Peacock travelled to Westport in a white convertible Miata. He was stopped by a police officer in the town of Williams for driving with expired registration and said that he was traveling to Mendocino County with his parole officer's permission. In fact, he did not have his parole officer's permission.

At about 10:30 that night, Richard Peacock knocked on the front door of Alan Simon's house in Westport, aggressively demanding to speak to "Kathy." Simon, who

was alone inside, told the man he had the wrong house and called 911. While still on the phone with the dispatcher, Simon opened his door and saw a man leaning against a white sports car with front end damage. Peacock walked back toward Simon, saying, "Hey, man, I don't want any trouble," and then pulled out a gun and fired it at Simon, grazing his head. Simon stepped back inside, closed his front door, and dropped to the floor inside his house. Peacock fired several more shots through the door and injured Simon's right wrist. Police who investigated the scene eventually found eight expended .22 caliber shell casings on Simon's front lawn and nine bullet holes in his front door.

Law enforcement officers spotted Peacock driving the white Miata near Westport the following day. When they attempted to stop him, he accelerated and threw a white plastic bag out the window. Peacock eventually stopped the car and was arrested; the bag was recovered and contained a Ruger .22 caliber semiautomatic handgun containing only one of ten rounds. Ballistics tests revealed that the Ruger was the gun used in the Simon shooting.

The gun was previously owned by Velma Bowen, who had allowed appellant and his family to stay in her home in 1999. During the visit, appellant had stored some guns that he owned under Bowen's bed, near a box where she stored her .22 Ruger. After appellant and his family moved out, Bowen discovered the Ruger was missing. She asked appellant whether he had taken her gun, but he said no, he had his own Ruger. According to appellant's wife, however, she and appellant later found Bowen's gun in a toolbox and assumed it had been taken inadvertently during their move out of Bowen's home.

Appellant was interviewed about the Simon shooting by Mendocino County Sheriff's Department Detective Alvarado. Appellant acknowledged that he had issues with Simon (describing him as "an asshole," "rude," and "a jerk") but denied having anything to do with the shooting. He admitted telling Simon he wanted to "hang" him politically. Appellant told Alvarado that Richard Peacock and his brother Michael Peacock were convicts, that he had known Richard Peacock for 12 to 15 years, and that he had given Richard Peacock a job in his auto body business because he liked to help

people. Appellant said he had also employed Michael Peacock as a groundskeeper of some property he owned near the Jack of Hearts Creek, where he grew marijuana. Appellant was concerned about publicity regarding the marijuana because it was "not really the best thing for a Republican representative to have."

Appellant acknowledged that Richard Peacock had come to the Jack of Hearts property about a week earlier in a white convertible. He told Detective Alvarado that he "hoped to God" Richard Peacock was not involved in the Simon shooting, and commented, "I think Al [Simon] would set up shit like this." When Alvarado said that seemed unlikely given Simon's injuries, appellant suggested that the shooter could have been the husband of one of the women Simon had been "sleeping around with." Appellant complained about the lack of respect shown to him by the "new blood" in Westport and about Simon's public ridicule of him. Appellant continued to deny his involvement in the shooting in a subsequent interview.

On June 26, 2005, Richard Peacock called appellant from the Mendocino County jail and complained about the charges against him. Appellant told him, "[T]hey're trying to pull me into this whole thing, too." Appellant promised to "be there" for Peacock and to "take care of every bit of business on the outside that I have to . . . until you're out and free and released from this garbage." Peacock told appellant he was "sorry that all this came to your doorstep."

On June 28, 2005, the authorities searched appellant's Jack of Hearts property and seized 120 to 130 marijuana plants and processed marijuana. Also seized was a digital camera which contained a photo of Alan Simon's home, taken from the inside of a vehicle sometime after March 11, 2005.

Appellant was arrested and on June 29, 2005, made a telephone call from jail to his wife in which they spoke about the evidence against appellant being a "convict story." Appellant called his auto detailing business on the same day and told the person who answered to "make sure everything's all cleaned up." He complained that "Michael and Richard are pulling some bullshit, I don't know what . . . my bail is like half a million dollars."

Meanwhile, Richard Peacock received a letter while in jail that read, "Dear Richard. [¶] Hope all is going okay for you. I heard about Michael[']s B.S. and can't believe he could be related to you. Anyway, I will get the "Red Dog" to your kid with some school clothes, money, and will keep an eye out for her. Hope to see you soon, but it's tough. I'm sending . . . $40 for your books, more to come. [¶] Your friend, Kate. [¶] P.S. Who's this Keith guy calling for Michael? I'm not returning his calls. I think he has $ for?" The letter had a Yuba City postmark but no address; Richard Peacock did not know any "Kate" from Yuba City, and thought appellant's wife had sent the letter.

Appellant was called as a witness at Richard Peacock's preliminary hearing on August 4, 2005, and winked at Peacock as he left the stand. Later in the day, appellant's then-attorney Donald Masuda gave Peacock's attorney a message to the effect that appellant wanted Peacock to know that appellant's wife would be looking after or taking care of Peacock's daughter. When this message was relayed to Peacock, he became extremely upset and angry and said that the message was a threat to harm Peacock's daughter. Peacock explained that the "Red Dog" mentioned in the letter from "Kate" was a gun that had a red handle or an emblem of a red dog on the handle.[2]

In addition to the evidence described above, the prosecution called Michael Peacock as a witness at appellant's trial. He testified that he had a lengthy criminal record and had spent time in prison. In 2003, appellant and Michael Peacock had several conversations about a Black man in Westport, and appellant was "wishing somebody [would] hurt him, beat him up . . . ."[3] Michael Peacock thought appellant had offered him money and/or marijuana to beat the man up. He helped appellant grow marijuana on

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[2] Richard Peacock did not testify, but the prosecutor offered his statements about the threat and the "Red Dog" letter under the spontaneous statement exception to the hearsay rule, based on his demeanor upon receiving the message. (See Evid. Code, § 1240.)

[3] Keith Grier, a Westport resident who attended meetings of the water board, was asked to be a candidate against appellant in the recall election, but declined. Grier is African American.

his property and saw guns on that property, including one that looked like the gun used in the attack against Alan Simon.

According to Michael Peacock, he and his brother Richard had a conversation in Sacramento either the day of or the day before the Simon shooting. Richard told Michael he had plans to visit Westport and that appellant had asked him to "severely hurt" the guy who had got appellant "kicked off the water board." Michael had told police that Richard said he had been offered three to four pounds of marijuana by appellant to carry out the attack. Richard was looking for a "piece" and asked Michael where he could get one, though he did not say he was going to use a gun on Alan Simon.[4]

To rebut the evidence that appellant had threatened Richard Peacock's daughter with a gun known as the "Red Dog," appellant's wife, Christine Rogers, testified that she had helped Richard Peacock's wife and his daughter financially, and that appellant had promised Richard he would give his daughter a large stuffed animal – Clifford, the Big Red Dog – that he had won at the Marine World theme park. Alva Haught, who knew appellant and Richard Peacock, testified that in early 2005, he had seen the stuffed dog in appellant's auto body shop and asked if he could have it to give to his daughter.

Eric Beren, who knew both appellant and Richard Peacock, testified that Peacock was scary, violent and "institutionalized." Peacock did not have a lot of friends, and Beren believed he was so loyal to the friends he did have that he would take violent action against anyone who gave them problems. Beren also claimed that he and his wife had been interested in buying property in Westport and that appellant would sometimes show them pictures of houses for sale in that area on his digital camera.

The police officers who searched appellant's home and his property on Jack of Hearts Creek did not find a gun with a red handle or a picture of a red dog on the grip.

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[4] The hearsay statements made by Richard Peacock to Michael Peacock were admitted as declarations against interest and statements in furtherance of a conspiracy. (Evid. Code, §§ 1230, 1223.)

DISCUSSION

I. *Speedy Trial*

Section 1382 provides that in a felony case, a defendant must be brought to trial within 60 days of arraignment unless he enters a general waiver of time or requests or consents to a trial date beyond the 60-day limit. (§ 1382, subd. (a)(2)(A), (B).) When a general waiver of time has been entered, the court may "set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial." (§ 1382, subd. (a)(2)(A).) Appellant argues that he was deprived of his statutory right to a speedy trial under section 1382, as well as his right to a speedy trial under the federal Constitution. We disagree.

A. *Chronology*

Appellant, represented by his retained counsel Donald Masuda, was arraigned on the conspiracy and attempted murder charges on April 17, 2006. The prosecution and the defense agreed to a trial date of August 28, 2006, and the court solicited a personal waiver of time from appellant: "THE COURT: You understand that you have the right to be tried within 60 days of the date that you were arraigned on the information? [¶] THE DEFENDANT: I do, your Honor. [¶] THE COURT: Do you give up your right to a speedy trial in this case? [¶] THE DEFENDANT: Yes."

On November 6, 2006, the court granted the prosecution's request for a February 20, 2007 trial date, with no objection from the defense. At the request of defense counsel Masuda, the court asked appellant to confirm the previously entered waiver of time: "THE COURT: You do understand that you have waived time in this particular matter and that time waiver is still in effect, which means that there is nothing that prevents us from continuing the matter to the date set other than – that's a poor way of stating it. [¶] There is a time waiver, sir. You have waived time and the time waiver remains in full force and effect, and you understand that? [¶] THE DEFENDANT: Your Honor, I agree. Yes, I understand."

On February 15, 2007, the trial court granted an unopposed defense motion for a continuance and set the trial date for May 14, 2007. On May 9, 2007, the court granted

another unopposed defense motion for a continuance and set a trial date of August 13, 2007. Appellant again acknowledged that he had previously waived time and continued to do so.

On August 13, 2007, the date set for trial, the parties entered into a plea agreement under which appellant would plead guilty to the charge of accessory under section 32 and receive probation. On November 16, 2007, the date set for sentencing, the court indicated that it would not grant probation as contemplated by the plea agreement, and gave appellant the option of withdrawing his plea. Appellant withdrew his plea and the original charges of conspiracy to commit murder and attempted murder were reinstated.

Also on November 16, 2007, defense counsel Masuda advised the court of a potential conflict of interest that had arisen based on his having relayed a message from appellant to Richard Peacock's counsel that the prosecution was now claiming was a threat. Masuda indicated that he wanted some time to discuss the issue with the prosecutor to try to resolve the situation, and agreed to a hearing date of December 14, 2007. The court also advised counsel the trial was likely to begin in April 2008; Masuda did not object, though he told the court he did not want a trial date to be set because it was possible he would not continue to represent appellant. Masuda did indicate that he would clear his calendar for April 2008 in the event he remained on the case.

On December 14, 2007 and January 28, 2008, a hearing was held on defense counsel Masuda's potential conflict of interest. On January 28, 2008, Masuda asked to be relieved. The court granted the request and continued the case until February 22, 2008 so appellant could retain new counsel. On February 22, 2008, appellant advised the court he had not been able to retain counsel but would accept court-appointed counsel if that was his only option, and the court granted a two-week continuance (appellant had requested three weeks) to resolve the matter. The court continued the case again on March 7 and March 21, 2008, so that appellant could continue his efforts to retain counsel. At the March 21, 2008 hearing, the prosecutor noted that time had been previously waived and appellant did not disagree.

On May 9, 2008, the court appointed attorney Tim O'Laughlin, who had been making special appearances on appellant's behalf, to represent him at trial. The court selected a September 10, 2008 trial date with no objection by the defense, but that date was continued due to O'Laughlin's health problems. On September 25, 2008, O'Laughlin advised the court he would have to withdraw from the case.

On October 23, 2008, the trial court appointed the Petersen law firm to represent appellant. Trial was set for April 20, 2009 with no objection. The Petersen firm subsequently declared a conflict and on December 5, 2008, the court appointed attorney J. David Markham to represent appellant. The April 20, 2009 trial date was retained, but the defense filed a motion for a continuance and the court set a trial date of June 15, 2009 at the request of both the defense and the prosecution. The court continued the case to July 6, 2009, without objection from either side, and jury selection commenced on that date.

B. *Failure to Bring Appellant to Trial Within 60 Days of Rejection of Plea Agreement by Court*

Appellant argues that the trial court violated his rights under section 1382 by failing to either bring the case to trial or elicit an express waiver of time within the 60 days following the rejection of the plea agreement on November 16, 2007. He argues that the 95 days that elapsed between appellant's entry of a plea to accessory and his withdrawal of that plea constituted a break in the proceedings that caused the 60-day period of section 1382, subdivision (a) to run anew.

Appellant has forfeited this claim by his failure to object in the trial court or move for a dismissal of the charges on speedy trial grounds. (*People v. Harrison* (2005) 35 Cal.4th 208, 225 (*Harrison*); *People v. Contreras* (2009) 177 Cal.App.4th 1296, 1301.) He has also failed to demonstrate any prejudice from the delay, as he is required to do to obtain relief on appeal. (*People v. Martinez* (2000) 22 Cal.4th 750, 769.)

C. *Failure to Bring Appellant to Trial Within 60 Days of Order Relieving Masuda as Counsel*

Appellant alternatively claims that he should have been brought to trial within 60 days of the order relieving Masuda as his counsel. He relies on section 1382, subdivision (c), which provides, "If the defendant is not represented by counsel, the defendant shall not be deemed under this section to have consented to the date for the defendant's trial unless the court has explained to the defendant his or her rights under this section and the effect of his or her consent." Appellant reasons that he was not represented by counsel as of January 28, 2008, the date the trial court relieved Masuda, and he argues that the court was therefore required to advise him of his speedy trial rights. Absent such an advisement, he claims, the court was obligated to bring him to trial by March 28, 2008, the 60th day after Masuda was relieved.

We are not persuaded. Section 1382 ensures that a trial date will not be set beyond the 60-day limit without a knowing waiver by a defendant who is not represented by counsel. Appellant had been previously advised of his rights under section 1382 and had personally waived them while still represented by Masuda. He remained fully aware of this right, yet failed to object when the prosecutor indicated on March 21, 2008, that time had been waived. Additionally, attorney Masuda had agreed to a trial date in April 2008 while he was still counsel of record. Appellant cannot complain that he was not brought to trial by March 28, 2008 when his attorney had agreed to a later trial date. (See *People v. Harrison, supra,* 35 Cal.4th at p. 226 [court's reiteration of trial setting date to which defendant's counsel had agreed before court granted defendant's motion for self-representation did not violate § 1382, subd. (c)]; *Medina v. Superior Court* (2000) 79 Cal.App.4th 1280, 1287 [retained defense counsel has authority to waive 60-day period on behalf of defendant].)

D. *Federal Right to a Speedy Trial*

Appellant also argues that the delay in bringing his case to trial violated his federal constitutional right to a speedy trial. (U.S. Const., Amends. 6, 14.) He relies on *Barker v. Wingo* (1972) 407 U.S. 514, 530, under which a court is required to analyze such a

claim by considering the length of the delay, the reason for the delay, the defendant's assertion of his speedy trial rights, and prejudice.

None of the *Barker* factors point to a speedy trial violation in this case. Though more than three years passed between appellant's arraignment and the commencement of trial, the defense consented to the pace at which the case moved toward resolution. Appellant at no time asserted his speedy trial rights or attempted to withdraw a previously entered waiver of time; often it was the defense that sought a continuance. The case took a long time because it was complicated, because the parties attempted to effectuate a plea bargain that the court did not approve, and because appellant had difficulties finding replacement counsel once attorney Masuda was relieved. No speedy trial violation appears on this record. (See generally *People v. Anderson* (2001) 25 Cal.4th 543, 603-604.)

II. *Trial Court's Disapproval of Plea Agreement*

Appellant asks us to specifically enforce the pretrial plea agreement he reached with the prosecution, under which he would plead guilty to an accessory charge and be placed on felony probation. We decline to do so.

A. *Background*

In August 2007, the parties reached an agreement under which appellant would plead guilty to the charge of accessory to assault with a semi-automatic weapon in exchange for a dismissal of the conspiracy and attempted murder counts. (§§ 32, 245, subd. (b).) Under the terms of the plea agreement, appellant would be placed on probation with a maximum of 90 days in local custody or 120 days of ankle monitoring.

The probation report prepared in anticipation of the sentencing hearing on the accessory charge recommended a prison sentence instead of probation. The probation officer noted that during his interview, appellant had stated he was "innocent of any wrongdoing" and had pled guilty "just so he could get it over with, because he did not want his case to go to a jury based on his political involvement with the Republican party." Appellant had not expressed any remorse for the victim of the shooting, but

claimed that he had "tried to help people all his life." Letters from a number of Westport residents expressed fear and concern about appellant's release on probation.

At the date set for sentencing, the court indicated that it would not follow the disposition agreed to by the parties because (1) the probation report indicated that appellant had not accepted responsibility for his conduct; (2) the probation officer had concluded that appellant was not amenable to probation; and (3) some members of the community, as indicated by letters attached to the probation report, were opposed to a grant of probation . The court advised appellant that he was entitled to withdraw his plea if he did not want to face the possibility of a prison sentence on the accessory charge. After conferring with counsel, appellant withdrew his plea and the original charges were reinstated.

B. *Analysis*

We reject appellant's claim that the trial court erred when it declined to adhere to the plea bargain. A sentencing court is not bound by a plea agreement reached by the parties. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1360-1361 (*Kim*).) It has broad discretion to withdraw its approval of such an agreement at any time before sentencing, so long as it gives the defendant the opportunity to withdraw the plea. (§ 1192.5; *Kim*, at p. 1360.) The court may withdraw its approval of a plea agreement when it becomes more fully informed about the case (*People v. King* (1981) 123 Cal.App.3d 406, 408), or where, after further consideration, it concludes that the bargain is not in the best interests of society (*People v. Woodard* (1982) 131 Cal.App.3d 107, 110). The probation report prepared in anticipation of the sentencing hearing on the accessory charge supports the trial court's conclusion that appellant had not taken responsibility for his conduct and was not a proper subject for probation.

Appellant complains that in considering his failure to take responsibility, the court improperly considered the facts underlying the dismissed conspiracy and attempted murder counts, in violation of *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*). In *Harvey*, the Supreme Court held that a court, when imposing a sentence under a plea agreement, may not consider evidence of any crime as to which charges were dismissed

as a "circumstance in aggravation" supporting the upper term on the counts to which the defendant pled. (*Id*. at p. 758.) "Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." (*Ibid*.) As appellant notes, the trial court in this case specifically found that while he waived his rights under *Harvey* with respect to restitution, he did not enter a general *Harvey* waiver to any other aspect of sentencing.

Harvey does not assist appellant. The *Harvey* rule limits a court's sentencing discretion based on an implied term of a plea agreement; it does not preclude a court from considering the evidence underlying dismissed charges when determining whether a plea bargain should be approved in the first place.

Having failed to establish that the court abused its discretion in rejecting the probationary aspect of the plea agreement, we necessarily reject appellant's claim that he is entitled to specific performance of that agreement.

III. *Order Relieving Retained Counsel Masuda*

Appellant argues that he was deprived of the right to counsel of his choice because the court relieved his retained attorney, Masuda, based on a conflict of interest that did not actually exist. He claims the order relieving Masuda was structural error requiring reversal without a showing of prejudice. We disagree.

This issue arises from the following facts: retained counsel Masuda and appellant attended the preliminary hearing of Richard Peacock. At appellant's request, Masuda told Peacock's defense attorney that appellant wanted Peacock to know appellant's wife would take care of Peacock's daughter. When Peacock's attorney relayed that message to Peacock, Peacock became agitated, believing it to be a threat by appellant to harm his daughter. Peacock had recently received a letter from a "Kate" in Yuba City that referred to giving the "Red Dog" to Peacock's daughter, which, according to Peacock, referred to a gun owned by appellant that had a red handle or an emblem of a red dog on the handle.

The interchange was brought to the court's attention, with Masuda expressing concern that he might be called as a witness to the purported threat.[5] The court indicated that whether or not Masuda was called as a witness, evidence that appellant's counsel had been involved in conveying a threat (however inadvertently) could impair his credibility with the jury. The court suggested that appellant could waive any potential conflict or enter into a stipulation with the prosecution regarding the presentation of the evidence, but if one of those two things did not occur, the court would likely relieve Masuda from the case. After discussing the issue with appellant, Masuda advised the court he could no longer continue to represent appellant because he (Masuda) would probably be required to testify in the trial. He also stated that his recollection of events was significantly different than what was reported by Richard Peacock's counsel. Masuda was relieved as counsel with no objection by appellant.

"The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' . . . [A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144; see also *Wheat v. United States* (1988) 486 U.S. 153, 159.) This right is not absolute. When it is determined that the counsel of choice has a conflict of interest, courts have broad discretion to relieve that attorney, even over the defendant's objection, and even where the defendant is willing to waive the conflict. (*Wheat,* at p. 163.) A conflict of interest may arise when it appears defense counsel will have to be a witness in the case. (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 927-928 (*Donaldson*).)

A defendant's right to retained counsel of choice is arguably more extensive under the California Constitution. (See *People v. Jones* (2004) 33 Cal.4th 234, 243-244 (*Jones*); *People v. Baylis* (2006) 139 Cal.App.4th 1054, 1070.) State case law has recognized that although the trial court "has the discretion to overrule defendant's choice of counsel in order to eliminate potential conflicts, ensure adequate representation, or

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[5] The prosecutor did not claim that Masuda knew of the threatening nature of the message he conveyed.

prevent substantial impairment of court proceedings," it should exercise its power to remove retained trial counsel "with great circumspection." (*People v. McKenzie* (1983) 34 Cal.3d 616, 629, 630 (*McKenzie*), overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) Thus, in *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 957 (*Alcocer*), the court concluded, "A court abridges a defendant's right to counsel when it removes retained defense counsel in the face of a defendant's willingness to make an informed and intelligent waiver of his right to be represented by conflict-free counsel."

The trial court in this case reasonably concluded that Masuda could be called as a witness, as Masuda himself advised the court that he would likely have to testify. (*Donaldson, supra,* 93 Cal.App.4th at pp. 927-928.) The court was also rightfully concerned that Masuda, even if not called as a witness, could be diminished in the jury's eyes if evidence was presented that he had some part in conveying a threat by his client, and that this could impair the effectiveness of his representation. Notably, the record does not show that appellant was willing to waive the potential conflict when Masuda made his motion to be relieved; at the January 28, 2008 hearing, appellant and Masuda conferred off the record to discuss the conflict, after which Masuda asked to be relieved with no objection by appellant. (Contrast *Alcocer*, *supra,* 206 Cal.App.3d at pp. 956, 961.) Absent a waiver of the conflict by appellant, the court properly exercised its discretion in granting Masuda's motion to be relieved.

Appellant notes that during a status hearing held on April 11, 2008, *after* Masuda was relieved and before counsel had been appointed to replace him, the prosecutor stipulated that if Masuda chose to resume his representation of appellant, he would not be called as a witness or identified as the person who conveyed the message about Peacock's daughter. The stipulation was apparently made so that the case could move forward, given appellant's difficulty in finding replacement counsel.[6] At that same hearing,

[6] Appellant advised the court on March 7 and March 21, 2008, that he had paid Masuda to represent him and was trying to get that money back so he could retain new

appellant advised the court that he would be willing to waive any conflict if Masuda returned to the case. Kenneth Bareilles, an attorney making a special appearance on appellant's behalf, agreed to inform Masuda of the stipulation and appellant's waiver. But, Masuda did not thereafter appear and request to resume his representation of appellant, and the court instead appointed attorney O'Laughlin.

When reviewing the order relieving Masuda, we must consider the facts as they appeared at the time of the ruling. (See *Jones*, *supra*, 33 Cal.4th at p. 241.) Appellant's difficulties in securing new retained counsel, and his subsequent decision to waive any conflict of interest with respect to Masuda, do not establish that the court abused its discretion when it granted Masuda's request to be relieved, based on the facts that were then before it.

Appellant also complains that that in seeking to be relieved, Matsuda failed to comply with Code of Civil Procedure sections 284 and 285. Code of Civil Procedure section 284 provides, "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." Code of Civil Procedure section 285 provides, "When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney." Appellant does not adequately explain how Masuda's request to be relieved, based on a conflict of interest, violated either of these provisions.

VI. *Ineffective Assistance of Counsel*

Appellant argues that he is entitled to reversal because attorney Markham, who was appointed by the court and ultimately represented him at trial, provided ineffective assistance of counsel in several respects: (1) he elicited prejudicial testimony from

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counsel. He also indicated that while he had requested appointed counsel, he did not qualify due to his ownership of a business.

victim Alan Simon by asking a question during cross-examination to which he did not know the answer; (2) he failed to call appellant as a witness; (3) he allowed the prosecution to read a stipulation about Richard Peacock's attempted murder conviction that mentioned appellant by name; and (4) he called "only" two defense witnesses to the stand. The first two issues were raised in a motion for new trial that was denied by the trial court. When considering those issues we uphold the lower court's factual findings if supported by substantial evidence, and independently review the legal conclusions to be drawn from those facts. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724, 725.)

To demonstrate ineffective assistance, a defendant must show that (1) counsel's performance was deficient, falling below an objective standard of reasonableness; and (2) that deficient performance was prejudicial, in that there was a reasonable probability that, but for counsel's failings, the outcome would have been more favorable to the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) A defendant bears the burden of proving a claim of ineffective assistance by a preponderance of the evidence. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.)

A. *Cross-examination of Alan Simon*

Appellant argues that attorney Markham's performance as defense counsel fell below an objective standard of reasonableness because he elicited damaging testimony during the cross-examination of victim Alan Simon. Simon had testified that appellant came to his house before the recall election and asked him to withdraw his name from the recall petition. Following up on this conversation, the following exchange occurred: "[Defense counsel]: What happened next? [Simon]: You want to know what happened next? [Defense counsel]: That's what I'm asking. [Simon]: All right. I said – After I said, you know, 'Maybe you won't lose. You won't be recalled,' he said, 'You want to take that chance? You want to have a nig[g]er run this town? You want to have a woman who's sucked the cock of every man in this town be in charge? [¶] And I told him, 'Get out of my house.' And I opened the door and I told him, 'Don't ever come

back to my door.' I said, 'You don't know me, you don't know the way I was raised, you don't know my beliefs, and they're not the same as yours.' "

The comments reported by Simon were bigoted, crass and reprehensible. It is apparent that Markham would never have asked the "What happened next?" question if he had known what Simon's answer would be. During the hearing on the motion for new trial, Markham explained that he only asked the question because he believed he would get a different response – that Simon would testify that appellant left the house without anything else happening, which would tend to show appellant was not the "loose cannon" the prosecution was trying to suggest. Before Markham asked the question of Simon, he had turned to appellant and asked him if anything else happened after his conversation with Simon. The trial court concluded that the decision to ask the question was a tactical one based on reasoned considerations, and that the error complained of did not result in a miscarriage of justice.

We need not decide whether Markham provided inadequate representation while cross-examining Simon because appellant cannot establish that appellant suffered prejudice; i.e., that it is reasonably probable that but for counsel's error, the result of the proceedings would have been more favorable to the defense. (*Strickland*, *supra*, 466 U.S. at p. 694.) At Markham's request, the court gave the jury the following admonition: "Ladies and gentlemen, you may recall that Mr. Simon testified last week regarding certain racial comments made by the defendant when the defendant went to his residence to ask Mr. Simon to withdraw his name from the recall petition. The court has determined that those comments were improperly admitted and has stricken them from the record and you are directed at this time to disregard them." The court also gave CALCRIM No. 104, which advised the jury, "If I ordered testimony stricken from the record, you must disregard it and you must not consider that testimony for any purpose."

We presume the jury followed these instructions with respect to the evidence that appellant made a racial slur. (See *People v. Cain* (1995) 10 Cal.4th 1, 52.) Although the court did not strike the testimony regarding appellant's crass comment about the woman, there is no reasonable probability that that evidence affected the verdict. (*Strickland*,

supra, 466 U.S. at p. 694.) The jury heard no evidence as to who this woman was or why appellant would have made such a remark; the jurors could deduce that appellant was upset about being recalled, but there was ample additional evidence of that fact.

B. *Failure to Call Appellant as a Witness*

Appellant alleges Markham was ineffective in failing to call him as a witness. We do not agree. Markham explained at the hearing on the motion for new trial that he did not want to put appellant on the stand because appellant could not adequately explain some of the evidence against him. Markham found appellant to be insincere and lacking in credibility, and while he advised appellant of his right to testify, he thought such testimony would harm the defense case. Markham acknowledged that appellant told him at one point he wanted to testify. He told appellant it would not be in his best interests, but left the decision up to him.

The decision not to call appellant as a witness was a tactical one based on reasonable considerations, and does not establish ineffective assistance of counsel. (See *People v. Pangelina* (1984) 153 Cal.App.3d 1, 8-9.) Though appellant claims he was not advised of his right to testify, the trial court implicitly credited Markham's testimony to the contrary, and we defer to that determination. Though appellant argues that his testimony was critical because he would have denied making the racial slur described by Simon, counsel could have reasonably concluded that overall, appellant's testimony would do more harm than good. Additionally, appellant has failed to establish prejudice; i.e., that he would have obtained a more favorable result if he had testified.

C. *Stipulation Regarding Richard Peacock's Conviction*

Appellant complains that Markham was ineffective because he did not object when the prosecutor read a stipulation about Richard Peacock's murder conviction that mentioned appellant by name: "There is a stipulation that we would offer. That is that Richard Peacock has been tried and convicted for the attempted murder also being charged against Kenneth Allen Rogers, that his judgment is final at the state level and he is now serving a term in prison for the crime." Appellant notes that when the stipulation was discussed with the court outside the presence of the jury, the prosecution phrased it

differently, and did not mention his name: "That Richard Peacock has been tried and convicted for attempted murder in this case and that his judgment at the state level is final, that he is now serving an extended term in prison for the crime." The jury was well aware that appellant was being charged with the attempted murder of Alan Simon, and it is frivolous to argue that he was prejudiced by the language of the stipulation.

D. *Defense Witnesses*

Appellant complains, in a summary fashion, that "After the long trial [defense counsel] only put two short witnesses [sic] on the stand after the prosecution rested at [trial]." The defense actually called five witnesses, but regardless of the exact number, appellant fails to suggest what other witnesses should have been called. Appellant has failed to demonstrate either deficient performance or prejudice.

III. DISPOSITION

The judgment is affirmed.[7]

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.

[7] By separate order we have summarily denied appellant's petition for habeas corpus in case no. A134119.